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No.

In The
SUPREME COURT OF THE UNITED STATES

**SUE HARRIS DEBAUCHE,**
*Petitioner,*

v.

**EUGENE TRANI, ET AL.,**
*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. In the face of a *Forbes v. Arkansas Educational Television Commission* challenge to the alleged viewpoint-motivated exclusion of a duly balloted political candidate from a government-run debate, did the lower courts err in denying discovery and summarily dismissing the well-plead complaint without requiring the defendants, as required by *Forbes*, to give reasons for the exclusion and providing the plaintiff the opportunity to prove that the exclusion was unreasonable and viewpoint-discriminatory?

II. Did the court of appeals err in holding a civil rights plaintiff and her *pro bono* counsel liable for prevailing party attorneys' fees under 42 U.S.C. § 1988 when the statute makes no reference as to who should pay the award and when the well-plead complaint presented *prima facie* claims for constitutional relief?

## PARTIES

The individual petitioner in this case is Sue Harris DeBauche. The respondents are Dr. Eugene Trani (in his individual capacity and in his official capacity as President of Virginia Commonwealth University), L. Douglas Wilder (in his individual capacity), Clear Channel Radio, Inc., a Nevada corporation t/a WRVA-AM ("WRVA"), and Central Virginia Educational Telecommunications, Inc., a Virginia corporation t/a WNVT-TV ("WNVT").

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# PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

SUE HARRIS DEBAUCHE respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit filed on September 15, 1999, affirming in part and reversing in part the judgment of the United States District Court for the Eastern District of Virginia in this case.

## OPINIONS BELOW

The opinion of the court of appeals (Appendix A1 - A34)[1] is reported at 191 F.3d 499 (4th Cir. 1999). The opinion and order of the district court (A35 - A51) is reported at 7 F.Supp.2d 718 (E.D.Va. 1998). The opinion and order of the district court awarding attorneys fees and costs (A52 - A77) is unreported.

## JURISDICTION

The court of appeals entered its judgment on September 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

### U.S. Constitution, Amendment I, Freedom of Speech, Press and Association

Congress shall make no law. . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### U.S. Constitution, Amendment XIV, Privileges and Immunities, Due Process, Equal Protection

No State shall make or enforce any law which shall abridge

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[1] All citations to the Appendix to this Petition are cited herein as "A" followed by the page number referencing the document cited.

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**42 U.S.C. § 1983, Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**42 U.S.C. § 1988, Proceedings in vindication of civil rights**

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the

costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

**28 U.S.C. § 1927, Counsel's liability for excessive costs**

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

## STATEMENT OF THE CASE

The district court rushed to decide this case without the guidance of this Court's decision in *Arkansas Educational Television Commission v. Forbes*, 118 S.Ct. 1633 (1998) ("*Forbes*"). In *Forbes*, after a full trial on the merits, this Court found no intentional viewpoint discrimination in the exclusion of a political candidate from a debate sponsored by a government broadcaster. By contrast, in this case, after staying candidate Sue Harris DeBauche's legitimate discovery requests, the district court held no trial on her claim that she was unlawfully excluded from a state-run gubernatorial debate and, instead, summarily granted the defendants' motions to dismiss. The court never required the defendants to provide <u>any</u> reasons for excluding her from the debate, much less viewpoint-neutral reasons, and it refused to allow Ms. DeBauche the fair opportunity to prove that her exclusion was unreasonable and viewpoint-discriminatory.

This case is of particular significance in this election year because "candidate debates are of exceptional significance in the electoral process." Forbes, 118 S.Ct. at 1640. Unless the erroneous and restrictive decision below is reversed, the maxim that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content, or to favor one viewpoint over another, will in reality be mere rhetoric masking a closed two party political system. Under the crabbed reading of Forbes given by the panel majority, minority party candidates will be left wholly without a means to challenge improper exclusion from government funded and executed candidate debates. As Circuit Judge King stated in dissent:

> This is an important case that has come to a premature conclusion. State Colleges and Universities are places in which the infinite diversity of human thought should be celebrated. Such institutions ought not to be in the business of suppressing divergent viewpoints, a concept antithetical to the Constitution and to the cherished values upon which this nation was founded. We can only hope that, in this case, Sue Harris DeBauche was not silenced on account of her views as to how the Commonwealth of Virginia could best be governed. Unfortunately, as the result of the majority decision today, we may never know.

*DeBauche v. Virginia Commonwealth University*, 191 F.3d 499, (King, J., dissenting), A34.

The First Amended Complaint ("Complaint") alleged that Virginia Commonwealth University, an instrumentality of the Commonwealth of Virginia ("VCU"), and the other defendants purposefully discriminated against DeBauche by excluding her in 1997 from "Debate Virginia, the 1997 Virginia Gubernatorial Debate" ("Debate Virginia"), in violation of the First and

Fourteenth Amendments.[2] DeBauche was the duly balloted Virginia Reform Party candidate for Governor. Debate Virginia was the only *public* candidate debate in the 1997 Virginia gubernatorial race. The debate was co-sponsored, planned, promoted, managed and executed by VCU, and co-sponsors WNVT and WRVA, through the coordination of L. Douglas Wilder (a VCU Distinguished Professor and contract employee of WRVA), and Dr. Eugene Trani (the President of VCU) whose Executive Assistant served as Chairperson of the VCU Debate Coordinating Committee. Most if not all of the elaborate planning and production of Debate Virginia was coordinated and paid for by the defendant University which expended substantial public resources to propagate the viewpoints of the Republican and Democratic candidates for Governor to the exclusion of DeBauche's views and those of the Virginia Reform Party ("Party").[3]

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[2] In addition to 42 U.S.C. § 1983, jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

[3] "Planning for the debate was *spearheaded by VCU's Center for Public Policy and Wilder*, now a distinguished professor with the Center. . . . Administrators and staff members across the university, *including leadership from the Office of the President*, managed the daily execution of the event." See VCU University News Service News Release, A123-25 (emphasis added). VCU's involvement included written restrictions on speech used in the debate program, publishing the views and pictures of candidates Gilmore and Beyer on its Debate Virginia webpage, commercializing the debate with a theme and logo, providing infrastructure for a media blitz for the Debate, and expending substantial government funds. See Complaint ¶¶ 28, 29, 31; A89-92; see also A116, 118-20, 123-25, 130-32, 141-42, 144-53.

The Complaint specifically alleged that in 1997 each defendant and their agents were sophisticated political analysts who knew how modern political campaigns are run and who understood the central importance of promoting name recognition in the ultimate result of any election. Complaint ¶ 39-45a, 94-95; A93-94, A105-6. They also knew that since the campaign "was in a virtual dead heat" (Complaint ¶ 93, A105), the views of DeBauche could have radically changed the outcome of the campaign and the election. Based upon the historical performance figures of her Party, Ms. DeBauche could have affected up to 20% of the statewide vote and thus have cost either major party the Governorship. Complaint ¶ 39, 45, A94-95. Given the specific threat Ms. DeBauche posed, "VCU, Wilder and the private corporate defendants intentionally excluded Ms. DeBauche from Debate Virginia in order to promote the interests of the Republican and Democratic candidates for Governor and thereby to influence unlawfully the outcome of the election." Complaint ¶ 98, A106. The Complaint also contended that "[b]ut for the actions of the defendants in gerrymandering the 1997 election results by marginalizing plaintiff and preventing her from raising her name recognition, she would have received at least 15% of the statewide vote in the election." Complaint ¶ 45a, A95.

The Complaint thus set forth a clearly stated claim of intentional discrimination by all of the defendants in the exclusion of Ms. DeBauche from Debate Virginia. See Complaint, ¶¶ 2, 9a, 9b, 45a, 51, 62-65, 68-69, 73, 79, 82-84, 87, 89, 91, 98-99; A80 et seq. It also plainly alleged that all of the defendants either individually or jointly would hold statewide debates in the future from which candidates of the Party will be excluded and to which only Democratic and Republican candidates will be invited. Complaint ¶¶62, 69, 82-84; A100-01, 103-04.

It is hard to imagine in these paragraphs a more pristine example of proper notice pleading of a claim of intentional First Amendment discrimination under the Federal Rules of Civil Procedure. But despite this pleading, both the district court and the panel majority found that no claim had been stated. After first staying discovery, and without waiting for this Court's decision in *Forbes* (which was then pending and followed only a few weeks later), the district court granted the defendants' motions to dismiss on April 13, 1998. A35-51.[4]

The district court ruled that defendants VCU and Trani were entitled to sovereign immunity and that Trani also was entitled to qualified immunity.[5] A42, 43-45. It further ruled that defendants Wilder, WRVA and WNVT were not "state actors" and therefore were not subject to suit for their actions. A45-48.

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[4] DeBauche was completely without notice that defendant Wilder had even filed a motion to dismiss. His motion was, in effect, decided ex parte, since it was never served on Ms. DeBauche or her counsel pursuant to Fed. R. Civ. P. Rule 5 and no hearing was ever held. Wilder's counsel misaddressed the service copy of the motion. After it was returned by the U. S. Postal Service, he failed to readdress or forward it to DeBauche's counsel's correct address until after the district court's decision and the notice of appeal had been filed. See A174-76. This extraordinary procedural gaffe did not inhibit the lower courts from awarding Wilder "prevailing party" attorneys fees and costs under 42 U.S.C. § 1988 against DeBauche even though she never knew of, or had an opportunity to rebut, the motion on which Wilder was a "prevailing party."

[5] DeBauche did not appeal the district court's ruling granting sovereign immunity to defendant VCU.

The court also held that defendant Wilder, WRVA and WNVT were entitled to an award of prevailing party attorneys' fees and costs against DeBauche under 42 U.S.C. § 1988, concluding that DeBauche's alleged and unrebutted claims were "without foundation" and were "baseless and unreasonable." A4-8 When it became clear that Ms. DeBauche did not have the resources to pay any measurable amount of attorneys' fees, defendants WRVA and WNVT then requested that attorneys' fees and costs be levied on petitioner's counsel and The Rutherford Institute under 28 U.S.C. § 1927. A52. The district court proceeded to award attorneys fees and costs in the amount of $48,477 jointly and severally against DeBauche (under 42 U.S.C. § 1988) and against her "counsel of record" (under 28 U.S.C. § 1927). A75-77. The Commonwealth of Virginia, representing defendants VCU and Trani, did not join in the request for attorneys fees or costs or for sanctions against Ms. DeBauche's attorneys in the district court.

The panel majority in the court of appeals sustained the judgment of the district court but reversed the award of attorneys fees and costs against DeBauche's "counsel of record" under 28 U.S.C. § 1927. A22-24. (It also denied a motion by WRVA and WNVT seeking sanctions under § 1927 for having the temerity even to pursue an appeal.) The court of appeals majority also sustained the district court's ruling that DeBauche was liable for prevailing party attorneys fees under 42 U.S.C. § 1988, but went on to hold that her *pro bono* attorneys also could be held liable for such fees under § 1988. A22. It reversed the monetary judgment levied by the district court and remanded for a new monetary determination in light of Ms. DeBauche's allegations of impecunity. Id. The panel majority also suggested that Rule 11 sanctions against counsel and The Rutherford Institute could be considered sua sponte by the district court as a potentially alternate means of disciplining

counsel. A24[6]

## REASONS FOR GRANTING THE WRIT

### I. THE WRIT SHOULD BE GRANTED AND THIS CASE SUMMARILY REVERSED BECAUSE THE FOURTH CIRCUIT FUNDAMENTALLY ERRED IN UPHOLDING DISMISSAL OF THE CASE WITHOUT REQUIRING THE DEFENDANTS TO STATE THEIR REASONS FOR EXCLUDING CANDIDATE DEBAUCHE FROM DEBATE VIRGINIA AND WITHOUT ALLOWING HER THE OPPORTUNITY TO CONDUCT DISCOVERY AND PROVE UNLAWFUL VIEWPOINT DISCRIMINATION UNDER THE FREE SPEECH PRINCIPLES ANNOUNCED IN *FORBES V. ARKANSAS EDUCATIONAL TELEVISION COMMISSION*

#### A. The Courts Below Should Have Required A Statement of Reasons for the Exclusion of DeBauche from Debate Virginia

As the first appellate case since the decision in the *Forbes* case, this case specifically raised two questions which the Court

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[6] Ms. DeBauche does not appeal the Court of Appeals vacation of the district court's judgment against counsel of record under 28 U.S.C. § 1927. However, she vigorously contests any suggestion that the filing of this case was baseless or without foundation or that her counsel in filing the case violated Fed. R. Civ. P. Rule 11, particularly in light of the fact that this Court had not even decided the *Forbes* case when it was filed.

carefully noted did not appear in the record in that case --- "attempted manipulation of the political process" (118 S.Ct. at 1664), and unlawful viewpoint discrimination. *Id.* In *Forbes*, after *a full trial on the merits*, the jury explicitly found that the decision to exclude Forbes was based on reasonable grounds of journalistic discretion and not "political pressure" based on viewpoints. *Id.* at 1644.

Precisely the opposite situation is presented here. The district court summarily dismissed this case without any requirement that the defendants provide their reasons for excluding Ms. DeBauche, without any opportunity for discovery and without any chance for Ms. DeBauche to prove the facts. But Count III of the Complaint specifically alleged that programming decisions were, to use the words of *Forbes*, the result of "attempted manipulation of the political process" by politically astute defendants with vested interests in the major-party dominated political order. Moreover, while in *Forbes*, after discovery and trial, the jury found no viewpoint discrimination (id. at 1644), here Count II clearly made such a claim of viewpoint bias. On this foundation, in a civil rights case affecting core political speech and the basic integrity of democratic government, it was fundamental legal error for the district court to pretermit discovery and dismiss the Complaint.[7]

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[7] The courts below literally ignored Count III's allegations of "as applied" intentional discrimination under the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Washington v. Davis*, 426 U.S. 229 (1976); *Romer v. Evans*, 116 S.Ct. 1620, 1628 (1996). Inexplicably, the district court did not even properly describe the latter claim. See A37-38. But Count III plainly alleged that the defendants "*intentionally excluded* Ms. DeBauche from Debate Virginia in order to promote the interests of the

In addition to Ms. DeBauche's colorable allegations of intentional viewpoint discrimination, the defendants' complete stonewalling on their reasons for excluding Ms. DeBauche from Debate Virginia was per se arbitrary and unreasonable and by definition constituted viewpoint discrimination under First Amendment nonpublic forum principles. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985); *Forbes*, 118 S.Ct. at 1643-44. This Court noted in the *Forbes* case that the district court's initial dismissal of that case for failure to state a claim had been reversed by the Eighth Circuit, in part, because the broadcaster "had not given any reason for excluding him from the debate. . . ." *Forbes*, 118 S.Ct. at 1638. But here, the district court never required the defendants in any fashion to state their reasons for Ms. DeBauche's exclusion. Instead, it stayed all discovery and then summarily granted the defendants' motions to dismiss even though this Court was actually considering the *Forbes* case at the time. But *Forbes* requires that the exclusion of a candidate from a publicly-sponsored debate must be justified by "reasons." Here, the defendants gave no reasons, but simply stonewalled Ms. DeBauche and, indeed, upon her challenge in this case, continue to stonewall as to the reasons for her exclusion from the debate.

Certainly Ms. DeBauche's allegations of viewpoint and content discrimination, and the reasonable inferences necessarily drawn therefrom, more than satisfied the "notice pleading" requirements set forth in *Leatherman v. Tarrant County*, 507

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Republican and Democratic candidates for Governor and thereby to influence unlawfully the outcome of the election" Complaint ¶ 98, A106 (emphasis added). Additionally, the Court minimized the harm that was alleged, both in the past and in the future, to Ms. DeBauche and her Party. Complaint, ¶¶3, 6-6d, 42-45, 51-51a, 55, 59, 62-65, 69, 93-99; A81 et seq.

U.S. 163 (1993). Moreover, for purposes of a motion to dismiss under Rule 12(b)(6), her allegations should have been accepted as true and "construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Hishon v. King & Spalding*, 467 U.S. 71, 73 (1984).

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, *all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests*. . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to define more narrowly the disputed facts and issues.

*Conley v. Gibson*, 355 U.S. 41, 47 (1957) (emphasis added). Instead of following this Court's admonition that notice pleading requirements "make no more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief" (*Leatherman*, 507 U.S. at 167-69), the lower courts imposed a "heightened" pleading requirement, construed all inferences against Ms. DeBauche and justified their rulings with findings of fact contrary to the allegations of the Complaint and the limited information obtained from subpoenas of the candidates.[8]

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[8] Both of the lower courts eschewed the need for any public forum analysis. Instead, the case was decided on an erroneous and improperly devised *factual* predicate, namely, that Dr. Trani simply granted Mr. Wilder "permission" to hold a private debate at VCU (which he did not) and that Debate Virginia was Mr. Wilder's private event (which it patently was not). Had the

In short, despite *bona fide* claims of unreasonable exclusion and purposeful viewpoint discrimination against Ms. DeBauche's freedom of speech under *Forbes*, the court of appeals majority gave short shrift to this Court's recognition that "candidate debates are of exceptional significance in the electoral process." *Forbes*, 118 S.Ct. at 1640. Instead, it sanctioned a significant departure by the district court from accepted judicial procedure and failed to apply properly this Court's precedents governing Rule 12(b)(6) motions, political candidate debates, state action and immunity. This Court should, therefore, exercise its supervisory powers and summarily reverse the decision below, requiring instead, as in *Forbes*, that the defendants come forth with their reasons for the exclusion of Ms. DeBauche and permit her to conduct discovery and prove her claims of arbitrary and unreasonable exclusion and viewpoint discrimination.

**B. The Courts Below Should Have Allowed**

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courts permitted development of the record and conducted a forum analysis, as required by *Forbes*, they would have found that this case was not simply viewpoint discrimination in a broadcast debate, but viewpoint discrimination on a publicly funded University Website and in a public University auditorium executed and coordinated by Trani and Wilder as employees of VCU. Debate Virginia consisted of at least three public fora, including the VCU Web Site (which actively and affirmatively promoted the views and pictures of the two major party candidates), the debate forum in the auditorium of the VCU Performing Arts Center on Monday, October 6, 1997 before a live audience and questioners, and the broadcast of the debate to a broad audience over co-sponsors, WNVT (a public television station) and WRVA (a commercial radio station).

**Discovery on the Mixed Question of Law and Fact Relating to State Action**

With reference to the private party defendants, the panel majority ignored this Court's governing precedents holding that state action involving alleged joint public-private activities is inherently a mixed question of law and fact. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). In the absence of a factual record clarifying fully the specific roles and interrelationships between and among the various defendants in this case, no legitimate state action determination could be made. That record was obviously not developed because discovery was stayed over the objections of Ms. DeBauche. This unfairly prevented her from obtaining all of the facts necessary in support of her claim of state action by each defendant.

The premature ruling below reflects the courts' mistaken and inappropriate fixation on former Governor Wilder's *initial* invitation to candidates Gilmore and Beyer to discuss the issues on Wilder's WRVA radio talk show program. However, what began as a private talk show discussion was later transformed through negotiations with VCU into the government-run and government-funded "Debate Virginia," co-sponsored, co-ordinated and executed by VCU and the private broadcasters with Wilder acting in multiple roles as VCU Distinguished Professor, employee of WRVA and political kingmaker.[9] In the meantime, Ms. DeBauche also had qualified as a duly balloted candidate and, like candidate Forbes in his Arkansas debate, subsequently requested inclusion in Debate Virginia. By then,

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[9] See Complaint, ¶¶33-37; A92-93; "Wilder Holds Election Wild Card," Richmond Times-Dispatch, October 6, 1997, A157-59.

the debate had changed dramatically for constitutional purposes. Rather than on a talk show, the debate would be held in a public forum, the VCU Performing Arts Center. The pictures and views of the candidates would be promoted on VCU's Website. VCU and its co-sponsors, under the coordination of Wilder and Trani, also would invent and promote the theme "Debate Virginia," create a commercial logo for the Debate, mobilize VCU staff and support personnel, issue press releases, set ground rules, prepare press packets and media feeds, provide security and parking and expend tax dollars to produce Debate Virginia. As a result of these significant changes, and the extensive involvement of VCU, WNVT and WRVA in the co-sponsorship and production of the debate (¶¶24a, 28, 55; A88-91, 98), the Complaint specifically alleged that Wilder, WNVT and WRVA were private persons who worked jointly with the state defendants, received significant aid and assistance from the state defendants, were jointly engaged with state officials in the challenged actions and with them were acting under color of law. ¶¶9a, 9b, 82-84; A84-85, 103-04.[10]

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[10] Under 42 U.S.C. § 1983, it is well-established that the joint involvement of private and public bodies in discriminatory action, even private action significantly encouraged by a public body, constitutes state action for purposes of the Fourteenth Amendment. *Adickes v. Kress*, 398 U.S. 144, 152 (1970). In this regard, the Complaint claimed that VCU unlawfully "delegated" its affirmative constitutional duty to promulgate regulations for access to public forums like Debate Virginia and vested standardless discretion in nongovernmental persons or entities to make unlawful distinctions based on viewpoint. Complaint ¶53, A97-98. It also alleged that the "actions of the defendants were authorized, sanctioned, implemented and ratified by officials functioning at a policy making level" and, that the constitutional deprivations are "fairly attributable" to

It is difficult to imagine, taken in the context of the other allegations in the Complaint, a more clearly stated and specific allegation of joint state action involving the state defendants and Wilder, WNVT and WRVA. Judge King pointed out the significance of these facts in his dissent:

> The majority asserts that Wilder, in his role as a radio personality and political figure, cannot be considered a state actor with regard to his involvement in Debate Virginia. The majority overlooks, however, that Wilder was also a contract employee of VCU. The materials submitted below reveal that Wilder was appointed in 1995 to the position of Distinguished Professor in VCU's Center for Public Policy. Indeed, the record contains no fewer than eight letters pertaining to Debate Virginia that were drafted by Wilder or his staff on VCU's letterhead. During DeBauche's ongoing efforts to be included in the debate, she and other members of the Virginia Reform Party attempted to telephone Wilder at his VCU offices. FAC at ¶¶46, 48.
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> Absent discovery, it is impossible to ascertain the extent to which Wilder acted on behalf of VCU with regard to the organization and administration of Debate Virginia. Insofar as Wilder was indeed attempting to further the interests of his university employer, he was plainly engaging in state action within the contemplation of §1983, and is therefore potentially liable to DeBauche. The question cannot, in any event, be resolved as a matter of law on a motion to dismiss.

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the state. See Complaint ¶¶80-81 A103.

(citations omitted) A31-33. Instead of properly interpreting this Court's precedents,[11] and without permitting development of the record, the court of appeals rejected the claim of state action as a matter of law, requiring a showing of *state coercion*, as opposed to *significant encouragement*, of the private participants as a precondition to state action, relying on *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214, 217 (4th Cir. 1993). The panel majority said:

> While the state actors, VCU and Trani, worked with Wilder in the organization and promotion of the debate, *their conduct cannot be thought to have controlled his conduct* to such an extent that his conduct amounted to a surrogacy for state action. Moreover, they did not control the stations which only agreed to broadcast the debate. More pertinently, when we apply *Andrews to these facts*, we conclude that none of the four circumstances that we identified in *Andrews* exists in this case.

A15-16 (emphasis added). Wholly apart from the error of judicial "fact finding" on a motion to dismiss (in blatant contravention of the principle that a plaintiff is entitled to every favorable inference from pleadings in the complaint), the panel majority, with its focus on the coersion test, failed to follow this Court's recent determination that state action may also be found in "significant encouragement, either overt or covert" of private actions. *American Manufacturers Mutual Insurance Co. v. Sullivan*, ____ U.S. ____, 119 S.Ct. 977, 986 (1999). In this

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[11] *American Manufactuers Mutual Insurance Co. v. Sullivan*, ____ U.S. ____, 119 S.Ct. 977, 986 (1999); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 925 (1981); *Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980).

regard, the panel majority ignored entirely, as Judge King clearly protested in dissent, that Wilder was not simply an employee of WRVA, but a Distinguished Professor employed by VCU (and WRVA), a member of its Center for Public Policy which promoted the Debate, and he was, indeed, in a position to influence WRVA and WNVT, as well as the candidates and others. President Trani and Wilder were at the fulcrum of the co-sponsored public-private enterprise that produced Debate Virginia. And Wilder's refusal to return Ms. DeBauche's repeated requests by telephone calls to his office and his home, and VCU's failure to respond to telephone calls on its toll-free Debate Virginia hotline and e-mails to its website, linked all of the defendants to the deliberate stonewalling of Ms. DeBauche from Debate Virginia.[12]

For purposes of argument, even if the limited record in this case did not provide absolute legal certainty on the issue of state action, the allegations of the Complaint surely provided adequate notice of such a claim, and the district court erred in applying an incorrect standard of law and in deciding the state

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12 The panel majority also ruled under the *Andrews* case that Ms. DeBauche failed to allege that VCU sought to evade a clear constitutional duty by delegating it to a private party. Incredibly, the Court said that "there was no allegation of delegation" and there were no allegations to suggest VCU was using the private parties to evade that duty. A16. But paragraph 53 of the Complaint expressly alleged that "the state actor defendants have unlawfully breached and/or delegated their affirmative constitutional duty to promulgate constitutional regulations for access to, and expression in, designated public forums involving public service activities like Debate Virginia. . . by vesting standardless discretion in nongovernmental persons or entities action under color of state law. . . ." A97-98.

action question in the negative without providing Ms. DeBauche an adequate opportunity for discovery to prove it. As this Court made clear in the *Burton* case, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722. That inquiry was improperly short-circuited in the present case and should be remedied by remanding it to the district court with instructions for development of the record and findings in light of this Court's decision in *Forbes*.

### C. The Courts Below Erred in Granting Dr. Trani Immunity for His Participation in Excluding Ms. DeBauche from Debate Virginia.

First, the court of appeals sustained Dr. Trani's assertion of qualified immunity despite the specific claim of as applied viewpoint discrimination by him. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). It reasoned that the governing precedent was the *Forbes* case, which it noted was decided only "after Debate Virginia had taken place." A10. The court also noted that the Eleventh Circuit, in 1990, upheld the "content-based" decision of a Georgia public television station to include only the Republican and Democratic nominees, and to exclude a Libertarian Party nominee. *Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486, 488-89 (11th Cir. 1990). A11.

The problem with this approach is that it ignores a longstanding line of cases expounding clearly established principles of law outlawing viewpoint discrimination in

university and school facilities.[13] As Judge King pointed out, "DeBauche's right to inclusion became clear more than five years prior to the *Chandler* case, with the Supreme Court's decision in *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985)" and its predecessor, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). A28. Pointing out that this case involved a public official and state action denying access to a forum, Judge King observed that:

> Even in the case of a nonpublic forum. . . it is abundantly clear that a speaker may not be excluded on the basis of her viewpoint. As Justice O'Connor stated in *Cornelius*, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Id.* at 806. Moreover, "[t]he existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Id.* at 811 (citations omitted).

A28-29. In this context, Dr. Trani was most certainly on notice of the longstanding principles outlawing viewpoint discrimination in public forums, as expressed long ago in *Cornelius* and *Perry*, and also clearly sustained in cases involving *university* and school facilities in *Rosenberger v. Rector and Visitors of University of Virginia*, 505 U.S. 816 (1995), *Lamb's Chapel v. Center Moriches Union School District*, 508 U.S. 384 (1993), and *Widmar v. Vincent*, 454 U.S. 263 (1981). The *Forbes* decision did not alter, but simply continued, these longstanding and well-settled principles. See

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[13] It also ignores the claim of "as applied" intentional discrimination in an election case. *See* note 7, *supra.*

also *Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (exclusion of speaker from school board meeting); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) (exclusion of musical "Hair" from municipal auditorium). Moreover, even if the debate were totally private, Dr. Trani certainly could not indiscriminately authorize *government funding* for selected political candidates that was improperly motivated by unlawful viewpoint discrimination. See *National Endowment for the Arts v. Finley*, 118 S.Ct. 2168, 2178-79 (1998).

Second, in similar fashion, to avoid deciding the merits of the well-plead claims, the panel majority also misinterpreted the Eleventh Amendment and the *Ex parte Young*, 209 U.S. 123 (1908), doctrine to accord Dr. Trani sovereign immunity so that no injunctive relief could run to him. But none of this Court's recent elaborations upon the Eleventh Amendment required this result. Compare *College Savings Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd.*, ___ U.S. ___, 119 S.Ct. 2219 (1999) and *Alden v. Main*, ___ U.S. ___, 119 S.Ct. 2240 (1999). In apparent agreement that this dispute was capable of repetition and not moot, the panel approvingly referred to the district court's finding that it was more than conceivable that DeBauche as a Reform Party candidate for a political office will be excluded from a future debate including only Democratic and Republican candidates and involving a State University. A7. But instead of keeping Dr. Trani in the case to preserve remedies for prospective relief such as proscribing further expenditures of public funds to promote the views of selected candidates, the court of appeals prematurely determined on an inadequate record that the Eleventh Amendment, as a matter of law, did not permit injunctive relief despite an allegation of an ongoing violation of federally-protected rights. Complaint, ¶¶62, 69, 84; A100-01, 103-04. But under the circumstances of this

case, any proper determination of sovereign immunity could not be made without an adequately developed record. Moreover, even if injunctive relief were not available, this case still presented an appropriate occasion for declaratory relief that is permitted against state officials under principles announced in *Steffel v. Thompson*, 415 U.S. 452 (1974), and *Green v. Mansour*, 474 U.S. 64 (1985), and for which there is no bar of sovereign immunity.

## II. THE WRIT SHOULD BE GRANTED BECAUSE IT WAS WHOLLY IMPROPER TO HOLD A CIVIL RIGHTS PLAINTIFF AND HER *PRO BONO* COUNSEL LIABLE FOR PREVAILING PARTY ATTORNEYS' FEES UNDER 42 U.S.C. § 1988 IN THE ABSENCE OF EXPLICIT STATUTORY AUTHORITY OR A JUSTIFYING PRECEDENT IN THIS COURT AND WHEN THE WELL PLEADED COMPLAINT PRESENTED *PRIMA FACIE* CLAIMS FOR CONSTITUTIONAL RELIEF

The lower courts' failure to permit development of the record, and their mistaken and entirely premature factual assumptions about the involvement of the parties, led inexorably to the erroneous conclusion that DeBauche's claims were unreasonable and without foundation, meriting an award of attorneys fees under 42 U.S.C. § 1988. As if it were not enough that a candidate who was fearless enough to bring this action should be penalized, the court of appeals magnified its error by holding, in the absence of any precedent in this Court, that an award of attorneys under § 1988 could likewise be levied on Ms. DeBauche's pro bono civil rights counsel provided

by The Rutherford Institute.[14]

Not only does this decision by the Fourth Circuit directly conflict with the holding of the Third Circuit in *Brown v. Borough of Chambersburg*, 903 F.2d 274, 276-77 (3rd Cir. 1990), if upheld, it casts a considerable pall upon public interest litigation. Without any clear statutory authority in 42 U.S.C. § 1988 or precedent in this Court, the ruling presents an important unresolved question of Federal law, as confirmed by this Court's recent grant of *certiorari* on November 29, 1999, to consider whether "prevailing party" attorneys fees may be assessed against a non-party under 35 U.S.C. § 285. *Donald E. Nelson v. Adams USA, Inc., et al.*, 175 F.3d 1343 (Fed. Cir. 1999), cert. granted, ____ U. S. ____ (U.S. November 29, 1999)(No. 99-502).[15] As with the latter statute, the language of § 1988 makes no reference as to who may be required to pay

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[14] In its discussion of the lower court's award of attorneys fees and costs under 42 U.S.C. § 1988, the court of appeals majority held that "*If the [district] court intended to split responsibility for paying fees and costs between DeBauche and her attorneys, it may do so on remand.*" A22 (emphasis added). The panel provided no textual analysis or case law rationale justifying its *ipse dixit* holding under § 1988.

[15] This Court *in dictum* has expressed conflicting thoughts on the reach of § 1988, but it has never authorized an award of §1988 attorneys against counsel to a party, whether counsel to a plaintiff or to a defendant. Compare *Roadway Express v. Piper*, 447 U.S. 752, 761, n.9 (1980)("Neither 1988 nor 2000e-5(k) makes any mention of attorney liability for costs and fees") with *Kentucky v. Graham*, 473 U.S. 159, 164 (1985) ("Section 1988 does not in so many words define the parties who must bear these costs").

"prevailing party" attorneys fees. Given the decision below, the conflict it presents in the Circuits, and this Court's pending consideration of the *Nelson* case, this important and recurring question of Federal law should be resolved.

The jurisprudential damage inflicted by the majority's decision is readily apparent. Civil rights plaintiffs and pro bono counsel now will have to contemplate the prospect of routinely fending off motions for attorneys fees in election debate cases going to the heart of basic fairness in the democratic process. Moreover, the decision interferes with the remedial purposes of the civil rights laws which limit fee awards against plaintiffs, in part, because "decisive facts may not emerge until discovery or trial" and the "law may change or clarify in the midst of litigation." *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978). But the panel majority's crabbed reading of *Forbes* and its utter disregard of principles of fairness and openness in election matters sends a wholly contrary and inappropriate message to other minority party candidates: If you seek adjudication of your civil rights, without a "smoking gun" you and your counsel will be punished.

Finally, the defendants' attempts in the district court to impose fees on The Rutherford Institute, and the court of appeals' subsequent holding that § 1988 fees could be awarded against Ms. DeBauche's pro bono counsel (as amplified by the court of appeals repeated recitals of the district court's "concerns [about] how this case was funded" and Ms. DeBauche's "financial resources," A8, 19, and 22), raise serious issues under the Petition, Speech and Association Clauses of the First Amendment for the particular advocacy organization supporting this case and its affiliate counsel. See *NAACP v. Button*, 371 U.S. 415, 428-29 (1983), *In Re Primus*, 436 U.S.

412, 423 (1978), and their progeny.[16] But this ill-advised, after-the-fact, and indeed, illegal attempt to punish the purveyor of the message does not survive scrutiny under the Petition, Speech and Association Clauses or § 1988 case law.

At the time it was brought, and now, Ms. DeBauche's claims were, and are, reasonably grounded in law and fact. This Court had not even decided *Forbes* at the time this action was initiated and the Eighth Circuit had held that candidates possessed a "presumptive right of access" to appear in debates sponsored by government broadcasters. *Forbes v. Arkansas Ed. Television Corp.*, 93 F.3d 497, 504 (8th Cir. 1996). Moreover, the Complaint stated a valid cause of action, factually and legally, in light of the unique fora involved in this case, the joint sponsorship of the public and private defendants and the pendency of the *Forbes* case. Even the *Forbes* majority discussed application of First Amendment viewpoint discrimination claims to both "public and *private* broadcasters" (see 118 S.Ct. at 1639-40, discussion under headnote 2, emphasis added). In this case, as Judge King noted, the private broadcasters were linked for purposes of state action requirements by Mr. Wilder's employment with VCU and his "professional association with WRVA." A33. The failure of the panel majority to recognize these facts, together with the award of prevailing party attorneys fees against Ms. DeBauche's counsel and the conflict this decision poses among the circuits, mandates plenary consideration by this Court on this important

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[16] The panel majority indicated the lower court could consider "[Ms. DeBauche's] resources or her backing for this lawsuit." A22. Ms. DeBauche's counsel are cooperating attorneys for The Rutherford Institute which provided pro bono counsel who represented Mr. Forbes before the U. S. Supreme Court in that case.

issue of Federal law.

## CONCLUSION

If *Forbes* stands for anything, it is the proposition that government cannot put its hand on the scale to gerrymander or skew the political process. When government controls and commits substantial resources to promote the viewpoints of some duly balloted candidates, it also must at least provide a reasonable justification for the exclusion of other duly balloted candidates from any debate it chooses to fund or sponsor. But no justification at all was provided in this case. And no opportunity was given to Ms. DeBauche to conduct discovery or prove her case.

For the reasons set forth above, this Court should act in the exercise of its supervisory jurisdiction over the Federal courts and summarily reverse and remand the case to the district court (a) to conduct discovery and trial in light of this Court's decision in *Forbes*, (b) to require each defendant to state the reasons for the exclusion of Ms. DeBauche, and (c) to decide, after discovery and proper development of the record, the mixed questions of law and fact relating to state action and governmental immunity.

In the alternative, this Court should undertake plenary consideration of the important issues of Federal law presented by this case, including the extraordinary and unprecedented ruling of the court of appeals that prevailing party attorneys fees may be awarded against plaintiff's counsel under 42 U.S.C. § 1988.

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Respectfully submitted,

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